Supreme Court, U.S.
FILED

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No. 96 OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CARGILL, INCORPORATED, CARGILL GRAIN DIVISION,
Petitioner,

v.

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP, AND ITS PARTNERS, JOE PARSLEY, MARTHA PARSLEY, MICHAEL PARSLEY, JEFFREY PARSLEY, AND JOANN PARSLEY,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DEBORAH J. RACE
Counsel of Record
IRELAND, CARROLL & KELLEY
6101 South Broadway
Suite 500
Tyler, Texas 75703
(903) 561-1600

JAMES T. FOLEY, SUSAN COLLEY
FOLEY & COLLEY
401 First Place
Tyler, Texas 75702
(903) 593-8883
Counsel for Petitioners

March 7, 1997

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

QUESTION PRESENTED

1. Should this Court permit the Fifth Circuit to deny rehearing without explanation of this case which is in federal court on diversity jurisdiction, when pending rehearing the state court of last resort issued an opinion addressing the same substantive issue and, holding the opposite of the Fifth Circuit?

LIST OF PARTIES TO THE PRECEDING

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Cargill, Inc.
Cargill Grain Division
Petitioner/Appellant/Defendant

James Thomas Foley
Susan Colley
Foley & Colley
404 First Place
Tyler, Texas 75702
Attorney for Cargill, Inc., Cargill Grain Division

Deborah J. Race
Ireland, Carroll & Kelley
6101 South Broadway, Suite 500
Tyler, Texas 75703
Appellate Attorney for Cargill, Inc., Cargill Grain Division
Attorney of Record in United States Supreme Court

Parsley Dairy Farm, A Texas General Partnership
Plaintiff/Appellee/Respondent

Joe Parsley
Plaintiff/Appellee/Respondent

Martha Parsley
Plaintiff/Appellee/Respondent

Michael Parsley
Plaintiff/Appellee/Respondent

Jeffrey Parsley
Plaintiff/Appellee/Respondent

JoAnn Parsley
Plaintiff/Appellee/Respondent

John C. Hardy, III
Michael Keith Dollahite
Hardy & Atherton
909 E. SE Loop 323, Suite 750
Tyler, Texas 75701
Attorneys for Respondents

Armistead Gin Company, Inc.
Defendant Below

Scott F. Stains
Shivers & Mullen
1215 Olympia & York Tower
1999 Brian Street
Dallas, Texas 75201
Attorney for Armistead Gin Company, Inc.

The undersigned counsel also certifies that the following is a list of all parent companies and nonwholly owned subsidiaries of each corporate filer.

Cargill Incorporated has no parent company.

The following represents a list of nonwholly owned subsidiaries of Cargill Incorporated:

Abrolhos Oil N.L.

Agri-Tech Industries, Inc.

Agrograin Kereskedelmi R.T.

Algodoneria de las Americas, S.A.

Alimentos Concentrados Nacionales, S.A. (Alcon)

Amerigroup Incorporated

B.C.G.A. Punjab (Private), Ltd.

Beddingen Agrar-Service gbR (ASG)

Biret International S.A.

Cargill Agricola S.A.

Cargill B.V.

Cargill Cafetera de Manizales, S.A.

Cargill Chile Ltda. (Cargill, Incoporated Limitada)

Cargill - DNEPR Seed Research and Production

Cargill Espana S.A.

Cargill Feed Sdn. Bhd.

Cargill France

Cargill Global Funding PLC

Cargill Holdings

Cargill Hong Kong Limited

Cargill International, S.A.

Cargill Inversiones Ltda.

Cargill Investments

Cargill Investor Services S.N.C.

Cargill Jugos, Frutas, Y Vegetales S.A.

Cargill Limited - Cargill Limitee

Cargill - Maslichnye Kultury Seed
Research and Production

Cargill Milling Sp. zo.o.

Cargill Oilseeds Australia (Partnership)

Cargill Palm Products Sdn.Bhd.

Cargill Paraguay S.R.L.

Cargill Pasze, S.A.

Cargill PLC

Cargill S.A. Commercial E. Industrial

Cargill Taiwan Corpoaration

Cargill Tarim Sanayi ve Ticaret A.S.

Cargill Trading S.A.

CFSC A300, L.P.

CSFC Canadian Limited Partnership I

Changchun-Cargill Agricultural Products Processing Co., Ltd.

Compagnie Generale Des Salines De Tunisie

Consultoria y Correduria Mercantil, SA (CCOMERSA)

CR-1, L-P

DAN

Delta Holdings, Inc.

Desa Cargill Sdn.Bhd.

Desmotadora De Productores, S.A. (DEPSA)

Durafibre, Inc.

Earthshell Container Corporation

Eremov Glucose and Dextrose Combinat (Efremov)

Ethiopian Commodities Private Limited Company'

Euro Silo N.V.

EWR, Inc.

EYSK-EX-PORT

Fabrica Nacional De Alimentos Concentrados, S.A. de C.V. (Fanalco)

Far Eastern Silo Corporation

Financial Information Management

Fujiya Co. Ltd.

GAP - Sociedade Gestora de Participacoes Sociais, S.A.

Gerkens Cacao Industrie B.V.

Goertzen Seed research, Inc.

Grain Insurance and Guarantee Company

Habitec Financial, Inc.

Hopewell International Insurance Ltd.

Investigaciones Agricolas, S. de R.L.

Kent County Fertilizers Limited

Lactech, Inc.

Latin Amercia Agribusiness Development Corporation S.A. (LAAD)

Lease-Holding B.V.

Les Engrais Levis Limitee - Levis Fertilizer Limited

Les Engrais Saint Gregoire Inc.

Les Engrais Victoria Limitee - Victoria Fertilizers Limited

Liaoning Dongya-Cargill Seed Co., Ltd.

Limon Exchanges Elevator Limited Partnership

Mainline Terminal Limited

Mantero-Agricultrua e Comercio Internacional, S.A.

Marudai Food Co., Ltd.

Minetti y Cia Ltda S.A.

Minster (Thailand) Limited

Misner Fertilizers, Inc.

National Seed, Cotton and Milling Limited

North East Terminal Ltd.

NRG Railroad, Incoporated

Nutrena (Private) Limited

Nutrimentos Agropecuarios Cargill, S.A. de C.V. (NUTRICARSA)

Prince Rupert Grain Ltd.

Pritsa Power, S.A. de C.V.

Productora De Sal, C.A. (PRODUSAL)

PT Hindoli

Quality Pork International, L.L.C.

Ralph Dale Fertilizers Limited

Wilhelm Reuss G.m.b.H.

Wilhelm Reuss G.m.b.H. & Co. K.G. Berlin

Ridley Grain Ltd.

Saskferco Products, Inc.

SAO Valentin Agro-Industrial Ltda

Seaforth Corn Mills

Semillas Cargill, S.A.

Showa Sangyo Co., Ltd.

Sillery Distribution Centre Inc. - Centre de Distribution de Sillery, Inc.

Simplot Europe G.m.b.H.

Skyway Fertilizers Limited

South Ft. Meade General Partner, L.L.C.

South Ft. Meade Partnership L.P.

South West Terminal Ltd.

Tianjin Cargill Fertilizer Co., Ltd.

Voyager Technologies Inc.

Wanganui Wooldumpers

Waybrook I Limited Partnership

Western Feedlots Ltd.

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No. 96 -

IN THE

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OCTOBER TERM, 1996

CARGILL, INCORPORATED, CARGILL GRAIN DIVISION,
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v.

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP, AND ITS PARTNERS, JOE PARSLEY, MARTHA PARSLEY, MICHAEL PARSLEY, JEFFREY PARSLEY, AND JOANN PARSLEY,
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the district court denying petitioners motion to abate and/or dismiss and proceed to arbitration is dated February 23, 1996, and is reprinted in the appendix at 1-A. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's order denying petitioner's motion to abate and/or dismiss and proceed to arbitration is dated November 8, 1996, is not reported and is reprinted in the appendix at page 2-A. The order denying the petition for rehearing of the United States Court of Appeals for the Fifth Circuit dated December 16, 1996, is reprinted in the appendix at page 9-A.

JURISDICTION

The decision of the court of appeals was announced November 8, 1996. The decision denying the petition for rehearing is dated December 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

There are no constitutional provisions, treaties, statutes, ordinances or regulations directly involved in this case. Instead, this case turns on the Fifth Circuit's failure to follow the mandates of this Court as set forth in caselaw regarding the application of state law in cases based on diversity jurisdiction. Additionally, the state law applicable in the matter is also based on the caselaw as set forth by the civil court of last resort, and that case is reprinted in the Appendix at 11-A.

STATEMENT OF THE CASE

On November 8, 1996, the Fifth Circuit announced its opinion in this case. On November 15, 1996, the Texas Supreme Court, the civil court of last resort in Texas, announced its decision in *EZ Pawn v. Mancias*, 934 S.W.2d 87 (Tex. 1996).[1] Both cases presented the respective courts almost identical questions. The courts reached opposite conclusions.

In the present case, the appellant filed a motion for rehearing advising the court of the *EZ Pawn* decision and asking the Fifth Circuit to reconsider. 22-A. The Fifth Circuit denied the motion. 9-A. As this matter was removed to fed-

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[1] This opinion of the Texas Supreme Court was originally published in 40 Texas Supreme Court Journal 104. This publication stated on its cover that it covered the session of the Supreme Court of Texas for Friday, November 8, 1996. Therefore, originally the undersigned counsel believed the opinion was delivered November 8, 1996. However, on preparing this petition, counsel discovered that the opinion was actually delivered November 15, 1996, and has called this correction to both the district court's and the Fifth Circuit's attention.

eral court on diversity grounds, it would seem that the Fifth Circuit would be bound to apply the law as stated in *EZ Pawn* or to distinguish the case.[2]

1. Background Facts

Parsley Dairy Farm, a Texas general partnership, and its partners, Joe Parsley, Martha Parsley, Michael Parsley, Jeffrey Parsley and JoAnn Parsley ("Parsley") began buying cottonseed from Cargill Inc., Cargill Grain Division ("Cargill") in 1992 in connection with Parsley's dairy business. 3-A. Cargill would ship the cottonseed by truck and would send a sale confirmation and contract with or shortly after each shipment for signature. 3-A.

Each contract contained the following language: "The parties both agree that the sole remedy for resolution of all disagreements or disputes between the parties arising under this contract shall be arbitration proceedings under NGFA Arbitration Rules (or under the Rules specified on the front of this contract, if different). The decision and award determined by arbitration shall be final and binding upon both parties...." 3-4-A. The front of each contract specified that arbitration would be conducted under National Cottonseed Products Association ("NCPA") rules. 4-A.

Before, during and after the time Parsley was using the cottonseed, some of its cows became sick and died. 4-A. Thereafter, Parsley sent Cargill written notice of its claims against Cargill under the Texas Deceptive Trade Practices Act. 4-A. Approximately two months later, on July 14, 1995, Parsley sued Cargill and Armistead Gin Company in state court under various state law theories that Cargill and Armistead produced, manufactured, distributed or sold contami-

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[2] This argument was also urged to the court of appeals in Appellant's motion to recall the mandate, which was still pending at the time this petition was drafted.

nated cottonseed.[3] 4-A. Cargill removed the case to federal court on diversity grounds.[4]

Less than six months after Parsley originally sued Cargill, Cargill filed a motion to abate and/or dismiss the suit and proceed to arbitration. 4-A. The district court summarily denied Cargill's motion without a hearing and Cargill appealed this order to the Fifth Circuit. 4-A[5].

2. The Fifth Circuit Opinion

The Fifth Circuit, without hearing argument, affirmed the decision of the district court by per curiam opinion dated November 8, 1996. 2-A. The Fifth Circuit found that Parsley was a party to the contracts containing the arbitration clauses and was contractually bound by those clauses. 6-A.

However, the Fifth Circuit then found that Cargill had not timely demanded arbitration pursuant to the NCPA rules called for in the contract. 6-A. Rule 84 of the NCPA provides: "The member demanding an arbitration will be referred to as the complainant... Demand for an arbitration shall be made by letter or telegram addressed to the Secretary of the Association within 90 days after the complainant's right to arbitrate has accrued." NCPA General Rules, Ch.I, Art.7, Rule 84. 6-A.

The Fifth Circuit also found that by binding themselves to arbitrate, the Parsleys had become non-members willing to arbitrate under another NCPA rule. 6-A. The court concluded, "As such, the Parsleys must be deemed to have agreed to take all steps reasonably required by NCPA rules, explicitly

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[3] Cargill had purchased the cottonseed from Armistead Gin Company. However, Armistead is not involved in this appeal.

[4] Cargill Inc., Cargill Grain Division is a Delaware Corporation with its principle place of business in Minnesota. Parsley Dairy is a Texas partnership located in Texas.

[5] The district court order is reprinted and attached at 1-A.

or implicitly, to facilitate arbitration." 6-A. However, the court still found the burden to be on Cargill to initiate that arbitration after Parsley filed suit against Cargill. 6-A. The Fifth Circuit then found that Cargill had failed to timely demand arbitration within the ninety days required by the NCPA as part of the contract. 7-A.

The Fifth Circuit rejected any argument based on the public policy favoring arbitration. The court stated:

> "This public policy, however, cannot be invoked to cure Cargill's unreasonable delay -- at 101 days beyond the deadline under NCPA Rule 84 -- in demanding arbitration as required by this rule, especially when the delay was wholly attributable to Cargill's motion. Cargill has no one to blame but itself for its predicament. There may be circumstances in which the public policy favoring arbitration could be the factor that pulls chestnuts out of the fire, but that policy cannot magically resurrect Cargill's chestnuts from these cold, dead ashes, 191 days after the fire burned out." 8-A.

The court's unpublished per curiam opinion was rendered November 8, 1996. Shortly thereafter, the Texas Supreme Court addressed the same issue.

3. The Texas Supreme Court Opinion

One week after the Fifth Circuit denied the above case, the Texas Supreme Court decided *EZ Pawn Corporation v. Mancias*, 934 S.W.2d 87 (Tex. 1996).[6] 11-A. The Texas Supreme Court was presented with facts strikingly similar to those before the Fifth Circuit.

In *EZ Pawn*, the parties had agreed to arbitrate. *Id*, at 89; 14-A. By contract the parties had also agreed to initiate arbi-

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[6] The Texas Supreme Court case of *E Z Pawn v. Mancias* is reprinted as at 11-A.

tration of any claims "no later than 180 days after any cognizable alleged cause of action accrues." *Id.* The plaintiff argued that EZ Pawn missed the 180 day deadline to demand arbitration because it did not seek arbitration until nearly ten months after the suit was filed and over two years after the cause of action accrued. *Id*, at 89; 16-A. The plaintiff argued that EZ Pawn had waived any right to insist on arbitration. *Id.* The court of appeals found that EZ Pawn's delay prejudiced the plaintiff because under the contract if arbitration is not initiated within 180 days, a party's claims or defenses may be barred. *Id.*, at 90; 18-A. The Texas Supreme Court disagreed.

The Texas Supreme Court first found that the plaintiff misconstrued the time limitations found in the arbitration contract. *Id.*, at 89; 16-A. The court found that "one party could not 'initiate' arbitration of another's claims...." *Id.* The Court adopted a construction compatible with the public policy favoring arbitration.

The Texas Supreme Court recognized the strong public policy favoring arbitration and the strong presumption against waiver. *Id.* The court stated, "This presumption applies in construing agreements to arbitrate whether the issue is 'waiver, delay, or a like defense to arbitration'." *Id.* The court also stated, 'Waiver of an arbitration right must be intentional." *Id.*

The court found that to defeat arbitration, the plaintiff had to show that EZ Pawn acted inconsistently with the agreement and that EZ Pawn's conduct prejudiced the plaintiff. The court of appeals had found that the delay prejudiced the plaintiff because under the 180 day provision of the contract, if arbitration was not initiated, a party's claims or defenses could be barred. *Id.*, at 90; 18-A. The Texas Supreme Court disagreed with the court of appeals analysis. The Texas Supreme Court held that the district court abused its discretion when it denied EZ Pawn's motion to compel arbitration. *Id.*, at 91; 21-A.

4. The Petition for Rehearing

The Texas Supreme Court decided *EZ Pawn* shortly after the Fifth Circuit decided this case. While *EZ Pawn* was not available when the Fifth Circuit decided the matter, it was available on rehearing. In fact, a copy of the *EZ Pawn* decision was attached to the petition for rehearing. 26-A.

As this case was in federal court on diversity grounds, it would seem that at a minimum the Fifth Circuit would be required to distinguish *EZ Pawn.* Instead, the Fifth Circuit simply denied the petition on December 16, 1996. 9-A.

REASONS FOR GRANTING THIS WRIT

This court has long mandated that, "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). This edict has come to be known as the Erie Doctrine. "Under the *Erie Doctrine*, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659 (1996).

The Federal Arbitration Act ("FAA") has been held to amount to "substantive" rather that "procedural" law. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995). However, the FAA has also been held to apply in state courts. *Id.*

"The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 1255, 103 L.Ed. 488 (1989). The FAA will only preempt state law to the extent it actually conflicts with the FAA. *Id.*

Instead, the state courts are to apply general state-law principles of contract interpretation to the interpretation of an

arbitration agreement within the scope of the act..."while giving due regard 'to the federal policy favoring arbitration'." *Id.*, at 1254.

The Texas Supreme Court did just that in *EZ Pawn*. The court held that there was a valid arbitration agreement between the parties and that the plaintiff had not met his burden to overcome the strong presumption favoring arbitration. *EZ Pawn*, 934 S.W. 2d at 91; 21-A. The court also found that the plaintiff misconstrued the time limitation in the agreement and that the 180 day limitation had not expired. *Id.* at 89; 16-A. The Texas Supreme Court construed the agreement in such a way as to favor arbitration. In contrast, the Fifth Circuit adopted a strained construction of the 90 day provision of the NCPA rules adopted by the contract: a construction that appeared to eschew the public policy favoring arbitration as well as mandates from this Court.

In the present case, the parties had agreed by contract that arbitration would be the sole remedy for any disputes arising between them. 3-A. According to the contract, any arbitration was to be conducted under NCPA Rules. 4-A. The Fifth Circuit then construed two provisions of those rules in such a manner so as to thwart the public policy favoring arbitration. 5-A. These provisions were Rules 84 and 93. 5-A.

Rule 84 provides: "The member demanding an arbitration will be referred to as the complainant... Demand for an arbitration shall be made by letter or telegram addressed to the Secretary of the Association within 90 days after the complainant's right to arbitrate has accrued." 6-A.

Rule 93 provides: "No non-member may demand an arbitration against a member of this Association. If a dispute arises between a member and a non-member, arbitration may be held if the member originates the request and the non-member is agreeable thereto. In such cases, the non-member must either (a) apply for membership, accompanying such application by the prescribed membership and arbitration fees,

or (b) deposit with the Association the regular arbitration fee plus a special fee..." 5-A.

The Fifth Circuit found that Cargill was a member of the Association, but that Parsley was not. 6-A. The court then found that Parsley was a party to the contracts and became contractually bound to the arbitration clauses. 6-A. The court even found that as such, Parsley became a non-member willing to arbitrate. 6-A. The court stated, "As such, the Parsleys must be deemed to have agreed to take all steps reasonably required by the NCPA Rules, explicitly or implicitly, to facilitate arbitration." 6-A.

However, then the Fifth Circuit found that the Parsleys could not initiate arbitration under the NCPA Rules, but were entitled to enforce Rule 84's requirement that the member notified of a complaint had ninety days within which to assert his rights to arbitration. 6-A. The Fifth Circuit concluded that Cargill had failed to timely demand arbitration. 7-A.

The Fifth Circuit rejected any argument that the filing of the suit should have tolled the ninety day period. At most, the Fifth Circuit found that the period began anew on the date of filing suit. 7-A.

As seen above, and in reading the Fifth Circuit opinion, the Fifth Circuit construed the terms of the contract and rules adopted by the contract. The Fifth Circuit did not rely on any waiver arguments related to the lack of activity in the trial court. Instead, this is a case where the Fifth Circuit was relying on general principles of contract construction. Hence, state law principles apply. *Volt*, 109 S.Ct. at 1254. That is why *EZ Pawn* controls and under the rationale adopted in *EZ Pawn*, the contract should be construed in favor of arbitration.

In *EZ Pawn*, the parties contracted for arbitration. *EZ Pawn*, 934 S.W.2d at 89; 15-A. The contract itself contained a 180 day provision wherein the parties mutually agreed to initiate arbitration no later than 180 days after any cognizable alleged cause of action accrued. *Id.*; 15-16-A. The plaintiff

argued that EZ Pawn missed the deadline. *Id.*; 16-A. The court found that one party could not "initiate" arbitration of another party's claims. *Id.*; 16-A.

The fact that the 180 day provision was contained in the contract in *EZ Pawn* and here the ninety day provision is found in the NCPA rules does not distinguish the two cases because here the contract adopted the Rules. And while it is true that the language is different in the provisions, it does not change the fact that the Texas Supreme Court construed the contract in such a manner so as to favor arbitration. The same easily could have been accomplished here.

Here the parties agreed by contract that arbitration would be their sole remedy. 3-A. They agreed by contract that arbitration would be conducted pursuant to NCPA rules. 4-A. The question of initiating arbitration was rendered moot by virtue of the contract.

It was Parsley that had a complaint. As a party to the contract, Parsley was obligated to notify Cargill, and as the Fifth Circuit even found, take whatever steps were necessary to facilitate arbitration. 6-A. Even if Parsley could not technically "initiate" arbitration under the NCPA Rules, it was obligated to take steps to initiate arbitration under the contract.

Under this Court's rules, "certiorari will be granted only for compelling reasons." Sup. Ct. R.10. Again, under this same rule, one example of such a compelling reason is when a United States Court of Appeals "has decided an important question of federal law in a way that conflicts with relevant decisions of this Court." Sup. Ct. R.10(c).

This Court has mandated that in diversity cases, the court is bound to apply state substantive law. *Gasperini*, 116 S.Ct. at 2219. Further, this Court has held that the FAA is substantive law which is applied in state courts. *Allied-Bruce Terminix*, 115 S.Ct. at 838. This Court has also held that general state law principles of contract interpretation are to be applied

giving due regard to the federal policy favoring arbitration. *Volt*, 109 S.Ct. at 1254. Finally, this Court has held that the FAA will only preempt state law to the extent it conflicts with the FAA. *Id.*, at 1254.

The Fifth Circuit in this decision, held directly contrary to the prior holdings of this Court. This alone constitutes a compelling reason for granting this writ. The Fifth Circuit was made aware of the *EZ Pawn* decision in the motion for rehearing. *EZ Pawn* clarified the Texas Supreme Court's position and offered the Fifth Circuit insight on the Texas Supreme Court's application of the law to a strikingly similar set of facts. The Fifth Circuit should have followed the principles of contract construction set forth in *EZ Pawn*.

CONCLUSION

For all of the foregoing reasons, certiorari should be granted in this cause and Cargill respectfully requests that this Court grant its petition.

Respectfully submitted,

DEBORAH J. RACE
Counsel of Record
IRELAND, CARROLL & KELLEY
6101 South Broadway
Suite 500
Tyler, Texas 75703
(903) 561-1600

JAMES T. FOLEY, SUSAN COLLEY
FOLEY & COLLEY
401 First Place
Tyler, Texas 75702
(903) 593-8883
Counsel for Petitioners

March 7, 1997

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IN THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP, ET AL.

V.

CARGILL INCORPORATED, ET AL.

CIVIL ACTION
NO. 6:95 CV 577

FILED
FEB 23 1996
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
David J. Maland Clerk
By Deputy /s/ Rita Robbins

ORDER

CAME ON for consideration this day the Defendant's Motion to Abate and/or Dismiss and Defendant's Motion for Protection. After review of motions, the responses of the Plaintiffs and the relevant law, the Court is of the opinion that the Defendant's Motions are not well taken. Accordingly,

IT IS ORDERED that the Defendant's Motion to Abate and/or Dismiss and Defendant's Motion

SIGNED this 23rd day of February, 1996.

/s/
John Hannah, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40267
(Summary Calendar)

FILED: NOV 08 1996
U.S. COURT OF APPEALS
Charles R. Fulbruge III,
Clerk

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP; JOE PARSLEY; MARTHA PARSLEY; MICHAEL PARSLEY; JEFFREY PARSLEY; JOANN PARSLEY
Plaintiffs-Appellees

versus

CARGILL INCORPORATED, ET AL
Defendants

CARGILL INCORPORATED
Defendant-Appellant

Appeal from the United States District Court
For the Eastern District of Texas
(6:95-CV-577)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges. PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Defendant-Appellant Cargill, Inc., Cargill Grain Division, (Cargill) appeals the district court's order denying Cargill's. Motion to Abate and/or Dismiss and Proceed to Arbitration (Motion). Finding that Cargill failed to assert its demand for arbitration in a timely fashion, we affirm.

I.

FACTS AND PROCEEDINGS

Plaintiffs-Appellees Parsley Dairy Farm, a Texas general partnership, and its partners, Joe Parsley, Martha Parsley, Michael Parsley, Jeffrey Parsley, and Joann Parsley (collectively the Parsleys), needed cottonseed to feed the cows on their dairy farm. Martha Parsley (Ms. Parsley) discussed the purchase of cottonseed with a Cargill salesman located in Minneapolis, Minnesota. Cargill had already purchased cottonseed from Armistead Gin Co., Inc. (Armistead) in Coushatta, Louisiana. Ms. Parsley and Cargill reached an oral agreement on the price, quantity, and quality of the cottonseed, and Cargill agreed that its truckers would deliver three separate shipments of cottonseed from Coushatta to the Parsley Dairy Farm in Texas. with or shortly after each delivery, Cargill sent Ms. Parsley a Sale Confirmation and Contract (Contract) which she signed but did not return.[1] Each Contract is a one page, preprinted document, on the front of which the particular shipment is described and on the back of which the terms and conditions of the sale are set forth. Specifically, the back of each Contract recites the following provision:

> The parties both agree that the *sole* remedy for resolution of all disagreements or disputes between the parties arising under this contract shall be arbitration pro-

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[1] The parties dispute whether the Sale Confirmation and Contracts accompanied each shipment or were received shortly thereafter; however, the resolution of this dispute is not necessary for us to decide the instant case.

> ceedings under NGFA Arbitration Rules (*or under the Rules specified on the front of this contract, if different*). The decision and award determined by such arbitration shall be final and binding upon both parties.[2]

The front of each Contract refers to the National Cottonseed Products Association Rules (NCPA Rules), indicating that arbitration under the NCPA Rules provides the sole remedy for resolution of all disagreements or disputes between the parties arising under the Contract.

Some of the Parsleys' cows became sick and died after eating the cottonseed purchased from and delivered by Cargill. The Texas Feed & Fertilizer Control Service ordered Cargill to recall the cottonseed and ruled Cargill in violation of the Texas Feed Act for selling adulterated feed. On May 4,1995, Cargill received written notice of the Parsleys' claims under the Texas Deceptive Trade Practices Act. Just two months later, on July 14, 1995, the Parsleys filed suit in Texas state court against Cargill and Armistead, alleging under various theories that Cargill and Armistead produced, manufactured, distributed, or sold contaminated cottonseed. Cargill removed the case to federal court and answered, seeking contribution or indemnity, or both, against Armistead. On January 22, 1996 -- 262 days after Cargill had received written notice of the Parsleys' claims and 191 days after the Parsleys had filed suit in state court -- Cargill filed a Motion to Abate and/or Dismiss and Proceed to Arbitration, asserting for the first time its demand for arbitration. The district court denied Cargill's Motion, and Cargill timely appealed.

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[2] Emphasis added.

II.

ANALYSIS

A. STANDARD OF REVIEW

We review *de novo* the district court's decision not to compel arbitration.[3]

B. NCPA RULES 93 AND 84

As earlier noted, each of the Contracts designates arbitration under the NCPA Rules as the sole remedy for resolution of all disputes between the parties arising under the Contracts. The NCPA Rules recognize that agreements may be made and disputes may arise between parties, some of whom may not be members of the National Cottonseed Products Association (Association). In particular, NCPA Rule 93 provides as follows:

> No non-member may demand an arbitration against a member of this Association.
>
> If a dispute arises between a member and a non-member, arbitration may be held if the member originates the request and the non-member is agreeable thereto. In such cases, the non-member must either (a) apply for membership, accompanying such application by the prescribed membership and arbitration fees, or (b) deposit with the Association the regular arbitration fee plus a special fee . . . .[4]

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[3] *Snap-On Tools Corp. v. Mason,* 18 F.3d 1261, 1264 (5th Cir. 1994); *Catholic Diocese of Brownsville v. A.G. Edwards & Sons, Inc.,* 919 F.2d 1054, 1056 (5th Cir. 1993).

[4] National Cottonseed Products Association General Rules, Chapter I, Article 7, Rule 93.

Cargill is a member of the Association, but the Parsleys are not. The Parsleys, however, are parties to the Contracts which contain the arbitration agreements. They became contractually bound by the arbitration clauses by virtue of Ms. Parsley's (1) signing the Contracts, (2) failing to question or object to the arbitration clauses in the Contracts, and (3) accepting the shipments of cottonseed. By thus binding themselves to arbitrate under the NCPA Rules, the Parsleys became Rule 93 non-members "agreeable" to arbitrate under the NCPA Rules. As such, the Parsleys must be deemed to have agreed to take all steps reasonably required by the NCPA Rules, explicitly or implicitly, to facilitate arbitration.

Even though, as non-members, the Parsleys could not initiate arbitration, they are nonetheless subject to all of the applicable NCPA Rules. Thus they are entitled to enforce Rule 84's requirement that the *member* who has been notified of a complaint and who attempts to invoke arbitration must assert his right within ninety days after that right has accrued.[5] Even if we assume the facts in the light most favorable to Cargill, i.e., that (1) Cargill's right to arbitration did not accrue, and thus the ninety days did not begin to run, until Cargill received written notice of the Parsleys' claims, (2) the initial ninety-day period was interrupted by the Parsleys' filing suit on the seventy-first day after Cargill received written notice of the Parsleys' claims, and (3) the ninety-day clock was thus reset at day-one and commenced to run anew from the date suit was filed, Cargill still would have failed to assert

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[5] Rule 84 provides: The member demanding an arbitration will be referred to as the complainant. . . . Demand for an arbitration shall be made by letter or telegram addressed to the Secretary of the Association within 90 days after the complainant's right to arbitrate has accrued. National Cottonseed Products Association General Rules, Chapter I, Article 7, Rule 84.

its demand for arbitration within ninety days as prescribed by Rule 84. Indeed, Cargill did not attempt to assert its right to arbitrate until it filed its Motion 262 days after receiving written notice of the Parsleys' claims and 191 days after the Parsleys filed suit. Until it finally filed that Motion, Cargill slept on its right to demand arbitration. Cargill's receipt of written notice of the Parsleys' claims--or, at a minimum, service of the Parsleys' suit--should have been a wake-up call to Cargill, alerting it to the fact that a dispute existed and that arbitration had to be demanded in the manner and within the time set forth in the rules that its own contract form specified.

Cargill has no excuse for its failure to demand arbitration timely. Cargill provided the Contracts, which mandate arbitration subject to the NCPA Rules, and Cargill is a member of the Association. As such, Cargill is presumed to be familiar with the NCPA Rules and is certainly in a better position than the Parsleys, who are not members, to know that a member desiring arbitration must demand it in a timely fashion. Furthermore, the Parsleys' filing suit in no way inhibited Cargill's ability to demand arbitration. And Cargill's awareness of the suit is shown by its prompt removal to federal court. If Cargill wanted arbitration, it should have invoked it in accordance with the rules of its own association.

Cargill's argument that by filing suit the Parsleys renounced their status under the NCPA Rules as non-members agreeable to arbitrate and thereby precluded themselves from invoking any other NCPA Rule to avoid arbitration, in particular Rule 84's ninety day limitation, is logically flawed. Even if we accept *arguendo* Cargill's argument that the Parsleys violated the arbitration agreement by filing suit, at worst the Parsleys' action is a violation of the provision requiring arbitration; but it is not conceivably a renunciation of applicability of the NCPA Rules when and if Cargill should seek arbitration *after* such a violation by the Parsleys. Cargill cannot be heard to insist on application of the NCPA Rules to obtain

arbitration while arguing out of the other side of its mouth that the Parsleys have renounced *their* rights under those rules. If the NCPA Rules apply at all, they apply in their entirety.

In a last-ditch effort to salvage arbitration, Cargill emphasizes the strong public policy favoring arbitration. This public policy, however, cannot be invoked to cure Cargill's unreasonable delay--at least 101 days beyond the deadline under NCPA Rule 84--in demanding arbitration as required by this rule, especially when the delay was wholly attributable to Cargill's inaction, Cargill has no one to blame but itself for its predicament. There may be circumstances in which the public policy favoring arbitration could be the factor that pulls chestnuts out of the fire, but that policy cannot magically resurrect Cargill's chestnuts from these cold, dead ashes 191 days after the fire burned out. For the foregoing reasons, the district court's order denying Cargill's Motion to Abate and/or Dismiss and Proceed to Arbitration is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40267

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP; JOE PARSLEY; MARTHA PARSLEY; MICHAEL PARSLEY; JEFFREY PARSLEY; JOANN PARSLEY
Plaintiffs - Appellees

v.

CARGILL INCORPORATED, ET AL
Defendants

CARGILL INCORPORATED
Defendant-Appellant

FILED: DEC 16 1996
U.S. COURT OF APPEALS
Charles R. Fulbruge., III,
Clerk

Appeal from the United States District Court for the Eastern District of Texas, Tyler

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE MANDATE.

EZ PAWN CORPORATION d/b/a EZ Pawn and Dennis Terry, Relators,

v.

The Honorable Fernando MANCIAS, Judge, Respondent.

No. 96-0391.

Supreme Court of Texas.
Nov. 15, 1996

Employee brought action against his former employer. The 93rd District Court, Hidalgo County, Fernando Marcias, J., denied employer's motion to compel arbitration and plea in abatement, and employer appealed. The Court of Appeals, Seerden, C.J. 921 S.W.2d 320, affirmed. Employer sought relief by petition for writ of mandamus and by application for writ of error. The Supreme Court held that; (1) employer did not fraudulently induce employee to sign arbitration agreement, and (2) once employer established valid arbitration agreement under Federal Arbitration Act (FAA), employer had the burden to defeat it and employee did not meet his burden so as to overcome the strong presumption favoring arbitration under the FAA and thus, trial court abused its discretion when it denied employer's motion to compel arbitration and abate its proceedings pending arbitration.

So ordered.

1. Arbitration

Federal Arbitration Act (FAA) disfavors waiver and there is strong presumption against waiver and this presumption applies in construing agreements to arbitrate whether the issue is waiver, delay, or a like defense to arbitration. 9 U.S.C.A. § 1 et seq.

2. Arbitration

Waiver of arbitration right must be intentional.

3. Arbitration

Implying waiver from party's actions is appropriate only if facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right.

4. Arbitration

Waiver of arbitration right in cases where litigation has begun will be found only when the party seeking to enforce agreement substantially invokes judicial process to the other party's detriment.

5. Arbitration

To defeat arbitration, employee had to show that employer acted inconsistently with arbitration agreement and that employer's conduct prejudiced him.

6. Arbitration

Employee did not meet his burden to show that he suffered prejudice by employer's delay in demanding arbitration, such that employer waived arbitration.

7. Arbitration

Employee's failure to read arbitration agreement did not excuse him from arbitration.

8. Arbitration

Court presumes that a party who has opportunity to read arbitration agreement and signs it knows its contents.

9. Arbitration

There is nothing per se unconscionable about arbitration agreements.

10. Arbitration

Texas law favors settling disputes by arbitration.

11. Arbitration

Assuming unequal bargaining power between employee and employer existed did not establish grounds for defeating arbitration agreement under Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

12. Arbitration

Neither trial court nor appellate court should have considered employee's affidavit which was filed as part of his response to employer's motion to compel arbitration, where, before filing his response, employee had entered into an agreement, pursuant to rule providing that no agreement will be enforced unless it is in writing and filed as part of the record, whereby employer agreed to delay the hearing on its motion so long as employee filed his response at least one week before the hearing and employee did not file his response until the day before the hearing. Vernon's Ann. Texas Rules Civ. Proc., Rule 11.

13. Arbitration

Employer did not fraudulently induce employee to sign arbitration agreement; employer merely provided employee the stock option agreement including the arbitration agreement and told him to return it within a week and just as he did with other workers, employer encouraged employee to seek independent advice if he had any questions.

14. Arbitration

Once employer established valid arbitration agreement under Federal Arbitration Act (FAA), employee had the burden to defeat it and employee did not meet his burden so as to overcome the strong presumption favoring arbitration under the FAA and thus, trial court abused its discretion when it denied employer's motion to compel arbitration and abate its proceedings pending arbitration. 9 U.S.C.A. § 1 et seq.

F. Witche McCullough, III, Andrew W. Austin, Richard W. Rew, Francine L. Wilkins, Austin, Mike Mills, McAllen, for Relator.

Isreal Ramon, Jr., McAllen, for Respondent.

PER CURIAM.

In this proceeding, Texas EZPawn, L.P. d/b/a/ EZPawn[1] and Dennis Terry (collectively EZPawn) seek relief from the trial court's order denying arbitration of their dispute with Roel Gonzalez. EZPawn has sought relief by petition for writ of mandamus and by application for writ of error. EZPawn presents the case in this dual posture because the arbitration agreement in question incorporates both the Federal Arbitration Act (the FAA)[2], and the Texas Arbitration Act. The Texas Act provides for interlocutory appeal of an order denying an application to compel arbitration. *See* TEXCIV. PRAC. & REMCODE § 171.017. We have held that a mandamus relief is available to a party who is improperly denied arbitration under an agreement that incorporates the FAA. *See Capital income Properties-LXXX v. Blackmon,* 843 S.W.2d 22-23 n. 1 (TEX.1992); *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266 (TEX.1992). We conditionally grant EZPawn mandamus relief under the FAA. We deny the application for writ of error by separate order. However, we disapprove of the court of appeals' opinion.

Gonzalez worked for EZPawn from 1990 until April of 1993. During this time, the parties entered into an arbitration agreement as part of a stock option plan for management-level

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[1] Originally, Plaintiff sued EZ Pawn Corporation d/b/a EZ Pawn. In their answer, Defendants pointed out that the proper company name is Texas EZPawn L.P. d.b.a. EZPawn. Thereafter, Gonzalez amended his petition, adding EZPawn, L.P. as a defendant. Nevertheless, the incorrect style of the case had remained. The correct entity is Texas EZPawn, L.P. d/b/a EZPawn.

[2] See 9 U.S.C. § 1 *et. seq.*

employees at EZPawn. In the agreement, the parties agreed to submit any civil disputes between them, including claims of wrongful discharge and employment discrimination, to arbitration. Like other qualifying employees, Gonzalez signed the agreement and initialed each page. Subsequently, Gonzalez left EZPawn's employ.

Gonzalez sued EZPawn in August 1994 for wrongful discharge and employment discrimination. After EZPawn answered, the trial court issued a docket control order setting the trial for June 1995. Nothing occurred in the case until February 1995 when Gonzalez filed an amended petition. EZPawn sent written discovery to Gonzalez in March 1995, and then noticed his deposition for June 1, 1995. Because of counsels' scheduling conflicts, the parties rescheduled Gonzalez deposition, and agreed to reset the case for October 1995.

While preparing to take Gonzalez' deposition in late June 1995, EZPawn discovered the arbitration agreement. The record reveals that EZPawn had archived a part of Gonzalez' employment file, including the arbitration agreement, in a warehouse away from the EZPawn headquarters. When EZPawn found the agreement, it immediately notified Gonzalez' attorney about the arbitration. EZPawn also advised opposing counsel that Gonzalez did not have to answer outstanding written discovery and offered to cancel Gonzalez' deposition. However, Gonzalez refused to arbitrate. EZPawn then moved to compel arbitration and for abatement. At a hearing on its motion, EZPawn proved up the arbitration agreement and that it was within the FAA's scope. The trial court denied EZPawn's motion. On mandamus and by interlocutory appeal, the court of appeals affirmed the trail court 921 S.W.2d 320.

In the arbitration agreement, Gonzalez and EZPawn mutually agreed to initiate arbitration of "any cognizable civil claim which may exist against the other . . . no later than 180

days after any cognizable alleged cause of action accrues." Gonzalez asserts that because EZPawn did not demand arbitration until about ten months after Gonzalez filed suit, and more than two years after Gonzalez' claim accrued, EZPawn missed the agreed deadline to request arbitration. Gonzalez also reasons that because EZPawn did not timely request arbitration, it waived its right to insist upon the agreement. EZ-Pawn. Contends that did not waive its right to arbitration under the FAA because Gonzalez did not establish waiver as a valid defense to arbitration. We agree with EZPawn.

Gonzalez misconstrues the time limitation in the arbitration agreement. The agreement requires each party to initiate arbitration *of that party's own claims against the other* within 180 days after the claim accrue, it does not require a party to "initiate" arbitration of the other party's claims. Indeed, one party could not "initiate" arbitration of another's claims, or EZPawn would not be trying to compel Gonzalez to initiate arbitration now. EZPawn has no claims against Gonzalez. Rather, EZPawn argues that Gonzalez was obliged to initiate arbitration of his claims. EZPawn does not argue that Gonzalez has waived his claims altogether by failing to initiate arbitration, only that he must do so now.

Gonzalez also argues that EZPawn has waited too long to request arbitration, apart from the 180-day provision in the agreement. The FAA disfavors waiver, and there is a strong presumption against waiver. *See Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (183); *Prudential Sec. Inc. v. Marshall,* 909 S.W.2d at 898-99; (Tex. 1995). This presumption applies in constructing agreements to arbitrate whether the issue is "waiver, delay, or a like defense to arbitration." *Moses H. Cone*, 460 U.S. at 25, 103 S.Ct. at 941. Waiver of an arbitration right must be intentional. *See Merrill Lynch v. Eddings,* 838 S.W.2d 874, 879 (Tex. App.—Waco 1992, writ denied). Implying waiver from a party's actions is appropriate only if

the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right. *Eddings*, 838 S.W.2d at 879. Waiver in cases where litigation has begun will be found only when the party seeking to enforce the agreement substantially invokes the judicial process to the other party's detriment. *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th cir.1986). Consequently, to defeat arbitration here, Gonzalez had to show that EZPawn acted inconsistently with the agreement and that EZPawn's conduct prejudiced him. *See Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 66 (5th Cir.1987); *Marshall*, 909 S.W.2d at 898-99; but see *Spain v. Houston Oilers, Inc.*, 593 S.W. 2d 746, 747 (TexCiv.App. —Houston [14th Dist.] 1979, no writ)(holding three year, eight month lapse between notice of claim and demand for arbitration unreasonable, prejudicial per se and was a waiver).

At the hearing on EZPawn's motion to arbitrate, EZPawn proved up the parties' arbitration agreement and that it applied to Gonzalez' claims. Gonzalez did not dispute its existence. Instead, he argued that EZPawn's delay in demanding arbitration waived its arbitration right. However, Gonzalez, did not show that the delay prejudiced him. After first asserting that Gonzalez did not have to show prejudice at all, Gonzalez' attorney argued that: "[w]e just feel that there is prejudice here being shown by us going through all of the different steps here to get discovery, to answer, to get an agreed order and all that."

The record reveals very little activity in the case before EZPawns's arbitration demand. EZPawn answered the suit, participated in a court-ordered telephonic docket control conference, sent Gonzalez interrogatories and request for production, noticed his deposition, and entered into an agreed order resetting the case for a later trial date than originally scheduled. In construing the FAA, courts have held that such activity is not prejudicial. *See, e.g. Williams v. Cigna Fin. Advi-*

sors, Inc., 56 F.3d 656, 661-62 (5th Cir.1995)(holding no waiver where Cigna sought arbitration as soon as it discovered agreement despite preliminary filings and discovery in suit); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir.1991)(holding no waiver even though parties engaged in discovery, attended pretrial conference, amended scheduling order three times and moved to transfer case during thirteen-month period before filing motion to compel arbitration); *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 417-20 (5th Cir. 1985)(holding defendant did not waive its arbitration right despite filing answer, serving opponent with written discovery and seeking discovery protection order and extension of time to answer discover during eight months before moving to compel arbitration); *General G ar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 928-29 (5th Cir.1970)(holding no waiver though parties were aware of arbitration provision and conducted depositions for ten months before making arbitration demand). These cases illustrate that the burden to prove waiver is a heavy one. *Tenneco Resins, Inc.*, 770 F.2d at 420. Delay does not necessarily demonstrate prejudice. *Marshall*, 909 S.W.2d at 898-99; *Home Club, Inc. v. Barlow*, 818 S.W.2d 192, 193 (Tex. App.—San Antonio, orig. proceeding). Here, Gonzalez did not meet his burden to show that he suffered prejudice by EZPawn's delay in demanding arbitration.

The court of appeals held that EZPawn's delay prejudiced Gonzalez because under the agreement, if arbitration is not initiated within 180 days, a party's claims or defenses, including Gonzalez' complaint, may be barred. This analysis is flawed. In its motion to compel arbitration and at the hearing, EZPawn did not urge that Gonzalez waived his claims nor did it seek to bar Gonzalez from seeking recovery through arbitration. In fact, EZPawn has conceded that there is no evidence that Gonzalez waived his claims, and it has cited the equitable tolling provision of the agreement supporting Gonzalez' right to pursue his claims through arbitration.

Gonzalez next asserts that EZPawn cannot enforce the agreement because he never actually read it and therefore, did not understand its effect. Also, he argues that because of the parties' unequal bargaining power, the arbitration agreement violates public policy and therefore, EZPawn cannot enforce it. In a related argument, Gonzalez asserts that the arbitration agreement is unconscionable. These arguments do not persuade us.

Gonzalez' failure to read the agreement does not excuse him from arbitration. We presume a party, like Gonzalez, who has the opportunity to read an arbitration agreement and signs it, knows its contents. *See Cantella & Co., Inc. v. Goodwin,* 924 S.W.2d 943, 944 (Tex.1996); *Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex.1962). Gonzalez did not present any evidence of unconscionability in the trial court. Moreover, there is nothing *per se* unconscionable about arbitration agreements. In fact, historically, Texas law favors settling disputes by arbitration. *See L.H. Lacy Co. v. City of Lubbok,* 559 S.W.2d 348, 351 (Tex.1977). Arbitration agreements, like the one here, offer a permissible choice to traditional litigation that does not favor either party. *See L.H. Lacy Co.,* 559 S.W.2d at 352. Moreover, assuming unequal bargaining power between Gonzalez and EZPawn exists does not establish grounds for defeating an agreement to arbitrate under the FAA. *See Gilmer,* 500 U.S. at 33, 111 S.Ct. at 1655-56.

Although Gonzalez did not raise the issue on appeal, the court of appeals held that EZPawn fraudulently induced Gonzalez into signing the arbitration agreement. The court of appeals based its holding on a part of Gonzalez' affidavit alleging that Terry told Gonzalez to sign the agreement so he could participate in the stock option plan, and so he could continue employment with the company. We disagree with the court of appeals.

Gonzalez filed his affidavit as a part of his response to EZPawn's motion to compel arbitration. Before filing his response, Gonzalez entered into Rule 11 agreement with EZPawn whereby EZPawn agreed to delay the hearing on its motion so long as Gonzalez filed his response at least one week before the hearing. *See* TEX.R.CIV.P.11. Counsel for both parties signed the agreement and EZPawn filed it with the trial court. Nevertheless, Gonzalez did not file his response until the day before the hearing. At the hearing, EZPawn sought enforcement of the Rule 11 agreement. Accordingly, neither the trial court nor the court of appeals should have considered Gonzalez' affidavit. *See Padilla v. LaFrance* 907 S.W.2d 454, 461 (Tex.1995); *see also Tipps,* 842 S.W.2d at 269 (regarding proper summary disposition of motion to compel arbitration). The only competent evidence left in the record is undisputed. This evidence established that Terry did not fraudulently induce Gonzalez to sign the agreement. Instead, Terry merely provided Gonzalez the stock option agreement including the arbitration agreement, and told him to return it within a week. Just as he did with other employees, Terry encouraged Gonzalez to seek independent legal advice if he had any questions.

Finally, Gonzalez contends that the Texas Act prevails over the FAA and therefore, his suit, which alleges personal injuries suffered because of his alleged wrongful discharge, is exempt from arbitration. *See* TEX.CIV.PRAC. & REM.CODE § 171.001(c)(personal injury suits exempt from Texas Act except upon counsel's advice and upon written agreement). To support this argument, Gonzalez relies on *American Physicians Serv. Group, Inc. v. Port Lavaca Clinic Assocs.* 843 S.W.2d 675, 678 (TEX.APP.—Corpus Christi 1992, writ denied). Gonzalez misplaces his reliance on American Physicians. In *American Physicians*, the court of appeals did hold that "[u]nder the facts", the Texas Act prevailed over the FAA. *American Physicians*, 843 S.W.2d at 678. However, in *American Physicians*, the disputed arbitration agreement did

not state which act applied. The arbitration clause in *American Physicians* stated that arbitration would occur "pursuant to the laws of the State of Texas." *American Physicians*, 843 S.W.2d at 676. Under those facts, the court of appeals rejected the defendant's contentions that the FAA applied and construed the phrase "under the laws of the State of Texas" to mean the Texas Act. *American Physicians*, 843 S.W. 2d at 678. Here, the agreement references both the Texas Act and the FAA. This is not uncommon. In such cases we have held that the FAA prevails. *See, e.g., Marshall,* 909 S.W.2d at 897-99; *Blackmon*, 843 S.W.2d at 22-23 n. 1; *Tipps,* 842 S.W.2d at 271.

Once EZPawn established a valid arbitration agreement under the FAA, Gonzalez had the burden to defeat it. *See Marshall*, 909 S.W.2d at 898-900. Based on this record, we cannot conclude that Gonzalez met his burden to overcome the strong presumption favoring arbitration under the FAA. Accordingly, the trial court abused its discretion when it denied EZPawn's motion to compel arbitration and abate its proceedings pending arbitration. When a trial court erroneously denies a party the right to arbitration under the FAA, it has no adequate remedy at law. *See Marshall*, 909 S.W.2d at 900.

Therefore, we conditionally grant writ of mandamus and direct the trial court to order Gonzalez' claims against EZ-Pawn to arbitration. *See* TEX.R.APP.P 122. The clerk is instructed to issue writ of mandamus only if the trial court does not follow our direction.

22-A

NO. 96-40267

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CARGILL, INCORPORATED, CARGILL GRAIN DIVISION,
APPELLANT/DEFENDANT

V.

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP,AND ITS PARTNERS, JOE PARSLEY, MARTHA PARSLEY, MICHAEL PARSLEY, JEFFREY PARSLEY, AND JOANNE PARSLEY,
APPELLEES/PLAINTIFFS

On appeal from an order of the United States District Court for the Eastern District of Texas, Tyler Division, the Honorable John Hannah presiding, denying a stay pending arbitration

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PETITION FOR REHEARING

IRELAND, CARROLL & KELLEY, P.C.
DEBORAH J. RACE
Texas Bar No. 16448700
6101 South Broadway, Suite 500
Tyler, Texas 75703
(903) 561-1600
(903) 581-1071 (Fax)

FOLEY & BOYD, P.C.,
JAMES T. FOLEY
Texas Bar No. 07208500
401 First Place
Tyler, Texas 75702
(903) 593-8883 (Ph.) (903) 593-1099 (Fax)
ATTORNEYS FOR CARGILL, INCORPORATED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Cargill, Inc.
Cargill Grain Division
Appellant/Defendant

James Thomas Foley
Foley & Boyd
404 First Place
Tyler, Texas 75702
Attorney for Cargill, Inc., Cargill Grain Division

Deborah J. Race
Ireland, Carroll & Kelley
6101 South Broadway, Suite 500
Tyler, Texas 75703
Appellate Attorney for Cargill, Inc., Cargill Grain Division

Parsley Dairy Farm, A Texas General Partnership[
Plaintiff/Appellee

Joe Parsley
Plaintiff/Appellee

Martha Parsley
Plaintiff/Appellee

Michael Parsley
Plaintiff/Appellee

Jeffrey Parsley
Plaintiff/Appellee
JoAnn Parsley
Plaintiff/Appellee

John C. Hardy, III
Michael Keith Dollahite
Hardy & Atherton
909 E. SE Loop 323, Suite 750
Tyler, Texas 75701
Attorneys for Appellees

Armistead Gin Company, Inc.
Defendant Below

Scott F. Stains
Shivers & Mullen
1215 Olympia & York Tower
1999 Brian Street
Dallas, Texas 75201
Attorney for Armistead Gin Company, Inc.

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Cargill's right to invoke arbitration was contractual, rather than simply arising under NCPA rules. The Parsleys had already agreed by contract that arbitration was their sole remedy. The question as to who could invoke arbitration and whether or not it could be invoked was not in issue, for that had been decided by contract. Instead, the Parsleys had already agreed to arbitration, which arbitration itself was to be conducted, *not invoked*, under NCPA Rules.

II.

On the same day this Court handed down the above opinion, the Texas Supreme Court, relying on this Court's precedent, handed down *EZ Pawn Corporation v. The Honorable Fernando Mancias,* 40 Tex. Sup,. Ct. J. 104 (November 8, 1996). In *EZ Pawn,* the Texas Supreme Court, guided by Fifth Circuit decisions, reached the exact opposite result as this Court did in the present case.

III.

By filing suit, the Parsleys breached the contract with Cargill. Furthermore, they actively repudiated that contract and any agreement to arbitrate. In so doing, the Parsleys should be estopped from relying on NCPA Rules to deny Cargill its right to arbitrate. In light of the Parsleys' own conduct, Cargill's right to arbitrate would not accrue until a court made a judicial determination that the right even existed. Any time period to seek such a determination should be tolled and the only test applied should be whether or not the Parsleys were prejudiced by any delay in seeking such a judicial determination.

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NO. 96-40267

IN THE
UNITED STATES COURT OF APPEALS
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CARGILL, INCORPORATED,
CARGILL GRAIN DIVISION,
APPELLANT/DEFENDANT

V.

PARSLEY DAIRY FARM, A TEXAS GENERAL PARTNERSHIP, AND ITS PARTNERS, JOE PARSLEY, MARTHA PARSLEY, MICHAEL PARSLEY, JEFFREY PARSLEY, AND JOANNE PARSLEY,
APPELLEES/PLAINTIFFS

On appeal from an order of the United States District Court for the Eastern District of Texas, Tyler Division, the Honorable John Hannah presiding, denying a stay pending arbitration

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Appellant, Cargill Incorporated, Cargill Grain Division ("Cargill") and files this Petition for Rehearing and in support thereof shows:

SUMMARY OF OPINION

On November 8, 1996, this Court issued an opinion affirming the trial court's decision denying Cargill's motion to abate and/or dismiss and proceed to arbitration against the Appellees, Parsley Dairy Farm, a Texas General Partnership, Joe Parsley, Martha Parsley, Michael Parsley, Jeffrey Parsley and JoAnn Parsley ("The Parsleys") (Opinion at 1) While this

Court found the Parsleys had contractually agreed that arbitration under NCPA Rules would be the sole remedy of any dispute, the Court then held that Cargill waived its right to arbitration by failing to demand same within ninety (90) days pursuant to NCPA Rule 84.(Opinion at 4,7).

Under the Court's reasoning, once the Parsleys signed the contract they became non-members agreeable to arbitration under NCPA Rule 93. (Opinion at 5) As such, this Court decided the Parsleys then became subject to all NCPA rules and could enforce Rule 84 as well. (Opinion at 5) For the following reasons, Cargill urges this Court to reconsider its opinion and after rehearing same to withdraw the November 8, 1996 opinion and issue one in favor of arbitration.

POINTS FOR REHEARING

I.

Cargill's right to invoke arbitration was contractual, rather than simply arising under NCPA rules. The Parsleys had already agreed by contract that arbitration was their sole remedy. The question as to who could invoke arbitration and whether or not it could be invoked was not in issue, for that had been decided by contract. Instead, the Parsleys had already agreed to arbitration, which arbitration itself was to be conducted, *not invoked*, under NCPA Rules.

II.

On the same day this Court handed down the above opinion, the Texas Supreme Court, relying on this Court's precedent, handed down *EZ Pawn Corporation v. The Honorable Fernando Mancias,* 40 Tex. Sup. Ct. J. 104 (November 8, 1996). In *EZ Pawn*, the Texas Supreme Court, guided by Fifth Circuit decisions, reached the exact opposite result as this Court did in the present case.

III.

By filing suit, the Parsleys breached the contract with Cargill. Furthermore, they actively repudiated that contract and any agreement to arbitrate. In so doing, the Parsleys should be estopped from relying on NCPA Rules to deny Cargill its right to arbitrate. In light of the Parsleys' own conduct, Cargill's right to arbitrate would not accrue until a court made the a judicial determination that the right even existed. Any time period to seek such a determination should be tolled and the only test applied should be whether or not the Parsleys were prejudiced by any delay in seeking such a judicial determination.

ARGUMENT AND AUTHORITIES

I.

In its November 8, 1996 opinion, this Court found that the Parsleys had, by signed contract, agreed that arbitration would be their sole remedy to any dispute. (Opinion at 4) The Court also found that the Parsleys were subject to all NCPA Rules. (Opinion at 5)

The Court reasoned that the Parsleys had become non-members agreeable to arbitrate under Rule 93. (Opinion at 5) Rule 93 reads in part, "If a dispute arises between a member and a non-member, arbitration may be held if the member originates the request, and the non-member is agreeable thereto."(Rule 93 NCPA Trading Rules.) Under the Rules, the non-member agreeable to arbitrate is then required to do one of two things: either apply for membership or pay a fee, neither of which the Parsleys did. Here the parties are not relying on NCPA Rules to demand or invoke arbitration. That was agreed to by contract and that is what should distinguish this case from the very opinion issued by this Court.

Here a non-member entered into a contract with a member, a contract which mandated arbitration as the sole remedy. Therefore, neither Cargill's, nor for that matter, the Parsleys',

right to invoke arbitration arose under the NCPA. Instead, that right was contractual in nature. Cargill and the Parsleys agreed that the sole remedy to any dispute was arbitration.

Cargill and the Parsleys contracted for arbitration prior to the dispute. The parties agreed by contract that arbitration was to be their sole remedy. Therefore, by contract, either party could demand arbitration and, in fact, by contract that was both sides' only remedy in case of any dispute. Therefore, under the contract the Parsleys could not only demand arbitration, but were obligated to do so. By contract, the Parsleys agreed to arbitrate and the arbitration itself was then to be conducted, *not invoked*, under NCPA Rules.

This Court found that by signing the contract, "the Parsleys must be deemed to have agreed to take all steps reasonably required by the NCPA Rules, explicitly or implicitly to facilitate arbitration. " (Opinion at 5) This should include the steps required by Rule 93, namely, either applying for membership or depositing the arbitration fee. (NCPA Rule 93.) However, because here the Parsleys were contractually bound to arbitrate, then by contract, they had already agreed to all of the rights and obligations found under the NCPA, including those rights inuring to members only.

The Court focuses on Cargill's alleged failure to timely demand arbitration. In reality, it was the Parsleys who breached the contract by filing suit, rather than demanding arbitration. By contract, they not only had that right, they had a duty, for by contract, the Parsleys agreed that arbitration was their sole remedy.

II.

On November 8, 1996, the Texas Supreme Court issued an opinion addressing the same question in *EZ Pawn*, 40 Tex. Sup. Ct. J. at 104. There, the Supreme Court conditionally granted a writ of mandamus after the trial court, then the court of appeals, denied EZ Pawn's motion to compel arbitration. *Id.*, at 105. Both courts below had determined that EZ Pawn

had waived its right to insist on arbitration because it did not move for arbitration until ten months after Gonzalez filed suit and more than two years after Gonzalez' claim accrued. *Id.* In *EZ Pawn* the arbitration agreement provided that arbitration must be initiated within 180 days after the cause accrued.

The Texas Supreme Court found a strong presumption against waiver. The court stated, "Waiver of an arbitration right must be intentional" and also stated, "Implying waiver from a party's actions is appropriate only if facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right." *Id.*, at 106, citations omitted.

While clearly this Court is not bound by any decision of the Texas Supreme Court, it cannot be ignored that in reaching its decision, the Texas Supreme Court relied heavily on this Court's prior opinions. The Texas Court stated, 'Waiver in cases where litigation has begun will be found only if the facts demonstrate that the party seeking to enforce the agreement substantially invoked the judicial process to the other party's detriment." *Id.*, citing *Miller Brewing Companv v. Fort Worth Distributing Company,* 781 F.2d 494, 497 (5th Cir. 1986). The Court continued, "Consequently, to defeat arbitration here, Gonzalez had to show that EZ Pawn acted inconsistently in the agreement and that EZ Pawn's conduct prejudiced him." *Id.*

The Texas Supreme Court, relying on several other of this Court's opinions, then concluded, "Here, Gonzalez did not meet his burden to show that he suffered prejudice by EZ Pawn's delay in demanding arbitration. " *Id.*, at 107. In *EZ Pawn,* they had answered the suit, participated in a telephonic docket control conference, sent Gonzalez interrogatories and request for production, noticed his deposition, and entered into an agreed order resetting the case for a later trial date. *Id.*, at 106. Here, as in *EZ Pawn*, the Parsleys have not met their burden of showing harm.

Again, while this Court is not obliged to follow the Texas Supreme Court in this case, the opinion of that court is

significant. For there, the highest court in Texas, has interpreted the opinions of this Court as favoring arbitration in a case markedly similar to the case at hand. The prior opinions of this Court would seem to support the same conclusion in the current case. Instead, however, this panel concentrated on what it perceived as Cargill's failure, in spite of finding a valid contract calling for arbitration. The focus appears misplaced. It is the Parsleys who breached the contract by failing to acknowledge their binding agreement to arbitrate and, instead, seeking a judicial resolution of the dispute. How can the Parsleys repudiate the contract on the one hand and embrace it with the other to avoid the very arbitration they contracted for?

III.

By filing suit, the Parsleys breached their contract with Cargill. Furthermore, they actively repudiated the contract and any agreement to arbitrate. In so doing, they should be estopped from relying on NCPA Rules to deny Cargill its right to arbitrate. In light of the Parsleys' own conduct, Cargill's right to arbitrate would not accrue until a court made a judicial determination that the right existed. Any time period to seek such a determination should be tolled and the only test applied should be whether or not the Parsleys were prejudiced by any delay in seeking such a judicial determination.

As discussed above, the Parsleys entered into a contract with Cargill wherein they agreed that arbitration would be their sole remedy for any dispute. However, when the Parsleys perceived a dispute, they failed to abide by the terms of their contract and eventually sued Cargill in state court. By contract, the Parsleys were just as obligated as Cargill to seek resolution through arbitration. That arbitration right was invoked by the contract, not by NCPA Rules, and by contract, that arbitration was then to be conducted, not invoked, according to NCPA Rules.

Despite the contractual agreement, once the Parsleys filed suit, Cargill had no method or means of compelling arbitration except through court order. When the Parsleys chose to forgo the contract requiring arbitration and instead filed suit, then the only option for Cargill was to defend itself in that suit, and to seek a court order compelling arbitration. Since an order of this Court or the lower court would now be the only means available to Cargill to mandate its right to arbitration, then that right could not accrue until this Court acts to compel the Parsleys to arbitrate.

When the Parsleys filed their suit, they breached the contract. They put Cargill and the court on notice that they had no intention of arbitrating their claims. At that point, by their own actions, the Parsleys put the validity of the contract and the arbitration clause into question. The Parsleys should not be allowed to rely on a benefit they perceive under the NCPA Rules, while at the same time breaching the contract that mandates the applicability of those Rules. As this Court has stated, "Contracts bind persons to the assigned risks and benefits. " *Mennella v. Kurt E. Schon E.A.I., Ltd.*, 979 F.2d 357, 362 (5th Cir. 1992). The Parsleys cannot reject' the contract in its entirety by filing suit and then invoke the ninety-day provision found in NCPA Rule 83 to its advantage.

Instead, once the Parsleys opted to file suit instead of pursue arbitration as they had contractually agreed, then the only test that this Court should apply is that followed by the Texas Supreme Court in *EZ Pawn*; namely, did Cargill substantially invoke the judicial process to Parsleys' detriment? See *EZ Pawn,* 40 Tx.Sup.Ct.J. at 106, citing *Miller Brewing Company,* 781 F.2d at 497. The answer to that question is "no," and for that reason this cause should be submitted to arbitration.

CONCLUSION AND PRAYER FOR RELIEF

For all of the reasons stated herein, as well as for those found in Cargill's brief and answers to this Court's written

questions, Cargill should be held to be entitled to arbitrate the Parsleys' dispute according to the terms of the contract agreed to by the Parsleys. Contrary to this Court's opinion, there are no cold, dead ashes holding Cargill's chestnuts. If anyone's chestnuts are in the fire, it should be the Parsleys' and it is the Parsleys who should not be permitted to retrieve same. Not only does public policy favor Cargill, which it clearly does, but the facts in this case, including a signed agreement mandating that arbitration is the Parsleys' sole remedy, support Cargill as well. If, by contract arbitration is the sole remedy, then that cuts both ways. Both Cargill and the Parsleys must arbitrate any dispute.

Cargill considered seeking an *en banc* review of this matter, but decided against same, knowing this Court's policy discouraging such petitions. Cargill reasoned that, in spite of the zealous nature of the unpublished opinion, this panel would be receptive to reconsider the matter,, particularly in light of the recent Texas Supreme Court decision. The Texas Supreme Court relied on this circuit to reach that decision. If that court was incorrect in its interpretation of this Court's prior opinions, then, at a minimum, this Court's policy must need clarification.

For all of these reasons Cargill respectfully prays that this Court rehear this matter, and on rehearing, withdraw the opinion of November 8, 1996 and enter a decision in favor of Cargill and in favor of arbitration.

Respectfully submitted,
IRELAND, CARROLL &
kELLEY
6101 South Broadway,
Suite 500
Tyler, Texas 75703
(903) 561-1600
(903) 581-1071 (Fax)
By: /s/
DEBORAH J. RACE
Texas Bar No. 16448700

36-A

JAMES T. FOLEY
Texas Bar No. 07208500
401 First Place
Tyler, Texas 75702
(903) 593-8883
(903) 593-1099 (Fax)

ATTORNEYS FOR
CARGILL, INCORPO-
RATED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing has been served on Mr. John Hardy and Mr. Keith Dollahite, Hardy & Atherton, 909 ESE Loop 323, Suite 750, Tyler, Texas, 75701, via first-class United States mail, this day of November, 1996.

/s/_____
DEBORAH J. RACE